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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF JAMES LARRY POSTON

PATINO'S, INC., Petitioner

VS.

JAMES LARRY POSTON, AND
ROBERT LEE ALLMAN, Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 4, 1984 COUNSEL FOR PETITIONER

mg DP

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF JAMES LARRY POSTON

TOBER SAIFER SHOE COMPANY, Petitioner

VS.

JAMES LARRY POSTON, AND

ROBERT LEE ALLMAN, Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner PATINO'S, INC. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding on July 9, 1984.

QUESTION PRESENTED

Whether, under 28 U.S.C. §1738, state law governs the collateral effect of a state court judgment in a federal bankruptcy dischargeability proceeding?

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OPINIONS BELOW

This case arose in a bankruptcy court adversary proceeding. The opinions of the United States Bankruptcy Court, the United States District Court and the United States Court of Appeals for the Fifth Circuit all appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 9, 1984. This petition for certiorari is filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

> §1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies therof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

United States Code, Title 11:

§523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt -

* * * *

(2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by -

* * * *

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or

* * * *

STATEMENT OF THE CASE

This case is one of three cases now before the United States Supreme Court involving substantially the same issue of law. The first case docketed as No. 83-1634, styled Harold V. Simpson & Company vs. Ronald William Shuler, was actually the

last case of the three tried at the trial court level. The third case is styled, In re: Robert Lee Allman; Tober Saifer Shoe Company vs. Robert Lee Allman and James Larry Poston, in which case Petition for Writ of Certiorari is being filed at the same time as this petition. Although there are different parties in the three cases, counsel for petitioner is the same in all three, the Bankruptcy Judge deciding the cases initially is the same, and the same Judge wrote each opinion for the Court of Appeals.

There was a fourth case styled Masonry Products, Inc. vs. Benavides, which reached the U.S. District Court (a different judge) and was reversed and remanded at that point. There, the District Court found state law on full faith and credit did bind the Bankruptcy Court on collateral estop-

pel. A copy of that opinion is also included in the Appendix.

The common question of law is whether the United States Bankruptcy Court is bound by principles of collateral estoppel and by the Full Faith and Credit Statute, 28 U.S.C. §1738 to give effect to prior state court determinations of the same issues of fact between the same parties. In each of these four cases, the procedural context in the Bankruptcy Court was that the creditor brought an adversary proceeding to determine non-dischargeability of a debt. The evidence before the Bankruptcy Court consisted of authenticated copies of the pleadings and judgments of the state court. In each of the four cases, the state court judgments followed normal state court practice, and granted the relief sought by the Plaintiff without detailed

statements of all evidentiary facts being recited in the face of the judgment. In each case, a reading of the Plaintiff's pleadings together with the judgment would compel one to conclude that the state court made fact findings in the rendition of its judgment which adjudicated factual issues sufficient to bar a discharge of the debt in a subsequent bankruptcy proceeding.

The four cases differed slightly in the state court procedural context:

1. Simpson vs. Shuler was a default judgment in the state court containing a conclusory finding in the judgment that "Plaintiff's cause of action is based upon a liquidated demand and debt for obtaining by false pretense the items furnished by Plaintiff,...".

2. In re Allman: Tober Saifer vs. Allman and Poston involved a judgment

entered upon the stipulation and agreement of all parties, all being then represented by counsel, that judgment should be entered against the defendants as prayed for in a total amount which included exemplary damages. The only possible basis or reason for exemplary damages was that shown by the pleadings of the Plaintiff which pled facts within the non-dischargeablility provisions of 11 U.S.C. §523.

3. In In re: Poston; Patino's, Inc. vs. Poston and Allman the defendants Poston and Allman were represented by the same counsel as in the Tober Saifer case and similar facts were pleaded in the state court respecting the fraudulent conduct of Defendants Pos-

ton and Allman. When answer date came, subsequent to the agreed judgment in the Tober Saifer case, Poston and Allman elected not to contest that litigation and judgment was entered against them by default. That default judgment made a fact finding that "... the indebtedness sued upon and made the basis of this judgment was incurred by obtaining property by false representations and actual fraud other than a statement respecting financial condition, and also by fraud and defalcation while acting in a fiduciary capacity, done by Defendants jointly and severally: ...". The judgment included an award of exemplary damages, explainable only by reference to the petition for exemplary damages on the basis of the fraud of the defendants.

4. In Masonry Products v. Benavides, the judgment in the state court came at the pre-trial stage in a summary judgment proceeding.

Therefore, with the above-noted slight procedural differences, the issue now comes before this Court. The creditor in this case, as in each of the three pending cases, brought an action in state court for its debt and for determination that the debt was incurred in a manner which precisely fit the language of the federal statute, 11 U.S.C. Sec. 523, declaring that particular kind of debt not dischargeable in a bankruptcy proceeding. The state court had unquestioned jurisdiction of the subject matter and the parties. The state court made its findings of fact in every case in favor of the Plaintiff awarding the relief sought by the Plaintiff.

Thereafter the debtor filed a voluntary petition in bankruptcy and the creditor filed a complaint in the Bankruptcy Court to determine the non-dischargeability of the debt. In each case the matter was not heard in the United States Bankruptcy Court until a time sufficiently long enough after the state court determination that the witnesses who were employees of the creditor at the time of the operative facts were no longer available as witnesses. Therefore, the creditor in each case relied upon the principles of collateral estoppel and full faith and credit in the submission of the authenticated state court documents as controlling evidence in the case. The debtors in bankruptcy, offered no controverting evidence whatever. In each case the Bankruptcy Court simply held that it was not bound to accept the prior adjudica-

tions made by the state court and such ruling was upheld through the United States Court of Appeals.

Copies of the relevant state court pleadings and judgments are included in the Appendix to this petition, as well as copies of the three federal court opinions.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. THE DECISION BELOW IS IN CONFLICT WITH THE EXPRESS LANGUAGE OF 28 U.S.C. §1738, AND IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The pertinent part of 28 U.S.C §1738, defining the nature of the full faith and credit to be given, states "such . . . judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." (Emphasis added) It is plain that state law governs the collateral estoppel effect of the prior state court adjudication. The United States Supreme Court has so held in Allen v. McCurry, 449 U.S. 90, 96 (1980). In the Allen case Mr. Justice Stewart clearly

noted that there are federal rules of collateral estoppel which may be applied when determining the preclusive effect of the decisions of other federal courts but that ". . . Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so: . . .". (Emphasis added)

The Fifth Circuit and other courts below erred by imposing some different standard, perhaps a federal standard, perhaps a Fifth Circuit standard, perhaps a standard known only to the court so holding, when considering full faith and credit. It is abundantly clear from reading the opinions of the courts below that no attempt was made to determine the state law effect of the State of Texas laws with

respect to preclusive effect on fact issues determined in the judgments of the courts of Texas. Indeed, the opinion by Honorable Circuit Judge Tate makes no reference to Texas law whatever, refering to nothing more than two prior opinions of the Fifth Circuit mentioning Fifth Circuit rules of issue preclusion and collateral estoppel.

While paying lip service in passing to an opinion of the United States Supreme Court in Brown vs. Felsen, 442 U.S. 127, 139 n.10 (1979), the Honorable Fifth Circuit Court went on to ignore the principles of collateral estoppel mentioned in Brown as well.

The Fifth Circuit sought in this case and the related cases to establish a new and heretofore unknown requirement for the giving of collateral estoppel effect. The Fifth Circuit fashioned a new test, being:

"Whether the federal court would be able to discern from the state court record all of the subsidiary evidentiary facts upon which the allegations were made and upon which the state court ultimately relied in stating its conclusions and rendering its judgment." THERE HAS NEVER BEFORE BEEN SUCH A REQUIREMENT PLACED UPON STATE COURT JUDGMENTS. STATE COURTS OF TEXAS DO NOT HAVE SUCH A REQUIREMENT IN GRANTING FULL FAITH AND CREDIT TO THEIR OWN JUDGMENTS.

This misapplication of federal statute and conflict with decisions of the United States Supreme Court should justify the grant of certiorari to review the judgment below.

2. **TEXAS LAW WOULD COMPEL ISSUE PRECLUSION.**

There are two principal pleading systems used in the several states of our

union: (1) fact pleadings (requiring detailed allegation of all evidentiary facts); and (2) notice pleadings (requiring only fair notice of the claim asserted). Texas is a notice pleading state, having long ago abandoned any requirement for allegation of evidentiary subsidiary facts in the pleadings. Rule 45, Texas Rules of Civil Procedure, defines the system, and Rule 47 of T.R.C.P. provides, in pertinent part, in setting the standard for alleging "Claims for Relief" that the pleading shall simply contain "(a) a short statement of the cause of action sufficient to give fair notice of the claim involved." The case law is in accord to the effect that it is not necessary in Texas to plead evidence or set out detailed facts. It is only necessary to set forth in conclusory form the fact conclusions which state a cause of

action. Roberts vs. Roberts, 621 S.W.2d 835, 837 (Tex.Civ.App--Waco 1981, no writ); Edwards Feed Mill vs. Johnson, 158 Tex. 313, 311 S.W.2d 232, 234 (Tex.Sup. 1958). Under Texas law (T.R.C.P. Rules 85 and 91) the debtors as defendants in the state court had the full and fair opportunity to require more specificity but failed to do so. The pleadings and the judgment in this case were completely in keeping with established law and established usage in the courts in the state of Texas. The language of the pleadings and the language of the judgment clearly show a final judgment which granted the relief sought by the plaintiff including exemplary damages. The record is plain that such damages could only be awarded upon the pleadings for exemplary damages which were based entirely upon the fraud and false pretenses of the

debtors. Such is the only conceivable explanation for the judgment.

Moreover, it has been well established law for a very long time in Texas that "the scope of an estoppel is governed by the matters set up in the pleadings." 34 Tex. Jur.2d 607, Judgments §524 (citing further numerous authorities). If the factual issue is necessarily included within the scope of the pleadings, then it is finally determined and given conclusive collateral estoppel effect, whether or not there is any recitation of facts in the face of the judgment. Indeed, that is precisely the effect given by Texas courts to the judgments of federal courts under state law principles of collateral estoppel. Wilhite vs. Adams, 640 S.W.2d 875, 876 (Tex. Sup. 1982). It matters not at all whether the fact that the matter was adjudicated appears on the

face of the judgment paper itself so long as it was adjudicated under the pleadings in the case. 34 Tex.Jur.2d 597-600, Judgments §520 (citing numerous authorities).

The record in this case clearly and without the possibility of contradiction shows that the issue of the fraudulent conduct of the debtors was necessarily determined in the state court litigation and that the award of damages which was agreed upon by all parties and adjudged by the court could not have possibly been composed of anything other than the actual damages and the exemplary damages alleged for such fraudulent conduct. The Appendix contains the text of the pleadings and of the judgment.

3. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT REGARDING APPLICABILITY OF 28 U.S.C. §1738 IN FEDERAL BANKRUPTCY DISCHARGEABILITY HEARINGS.

The opinion of the Fifth Circuit in this case, and the other related cases mentioned above, constitute the only reported appellate authority on the precise issue. Although the United States Supreme Court has heretofore spoken clearly on collateral estoppel issues and full faith and credit issues, the Court has not heretofore written on applicability of this legal principle and federal statute to a bankruptcy dischargeability proceeding.

It is respectfully submitted that the Fifth Circuit has erred in applying some new notion of federal estoppel law with new requirements rather than following the express language of the Full Faith and Credit Statute as heretofore interpreted by

the United States Supreme Court. The error needs to be corrected, and the applicability of correct principles of law in this area needs to be established by a decision of the United States Supreme Court.

Although there have been cases involving common law res judicata and common law collateral estoppel, this appears to be the first opportunity for clear writing upon the necessity for use of state law standards of collateral estoppel when employing the federal Full Faith and Credit Statute.

Certainly, it is recognized and should be recognized that the federal courts have exclusive jurisdiction over the legal issue of dischargeability of a debt in bankruptcy proceedings. It should be equally clear, however, that the federal courts will respect the federal statutes which grant issue preclusion by giving full faith and

credit to state court judgments. It should be made abundantly clear that the full faith and credit required is the same which a state gives to judgments of its own courts.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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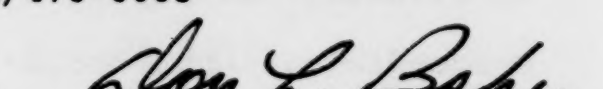
By: 
Don L. Baker

September 4, 1984 COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1984, three copies of the Petition for Writ of Certiorari were mailed, first-class postage prepaid, to Joseph D. Martinec, Esq., Martinec & Hargadon, 600 West 12th Street, Austin, Texas 78701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Don L. Baker

DON L. BAKER

APPENDIX

NO. 305,047

PATINOS INC.	X IN THE 250TH
	X DISTRICT COURT
	X
VS.	X OF
	X
KIRBY'S	X TRAVIS COUNTY,
	X TEXAS

PLAINTIFF'S
ORIGINAL PETITION

1. Parties. Plaintiff is Patinos, Inc. The corporate Defendant is Kirby's Shoe Co., Inc., whose president, Larry Poston, may be served with process at 6514 Bradley Drive, Austin, Travis County, Texas. The individual Defendants and their respective addresses for service of process are:

Larry Poston, 6514 Bradley Drive, Austin, Travis County, Texas; and

Robert Lee Allman, 5610 Cordell Lane, Austin, Travis County, Texas.

2. Facts. Gustinettes, Inc. is a corporate wholly owned subsidiary of

Patinos, Inc., a corporation. As shown in the attached statement of account, Plaintiff sold goods and services. These were billed in the name used by Defendants in their business enterprise and shown on such statement. Defendants accepted the goods and services and became bound to pay the stated price, which price is reasonable and fair, usual and customary. The individual Defendants did not disclose the existence or identity of any corporation to Plaintiff at any time until this account was referred to the undersigned attorneys for handling. Such goods were, therefore, bought by false representations made by each of the Defendants.

3. Liability for Debt. Although proper demands for payment have been made, Defendants have failed to pay the account

balance, due in the amount of $3,149.25. By reason of their failure to comply with various legal requirements pertaining to corporations, the individual Defendants have become individually liable on this debt. The business of the Defendants was also conducted as a partnership at the time of incurrence of this debt and each individual Defendant is liable as a partner. The indebtedness herein sued upon is also for defalcation while acting in a fiduciary capacity. Defendants also represented that they were solvent and able to pay for the goods as the debt came due when they purchased the same on open account. In fact, Defendants and each of them were insolvent at the time of ordering and at the time of receiving the goods, and had no real purpose, intention or hope of making payment on the account.

4. Attorney's Fees. The failure of Defendants to pay the account has made it necessary for the Plaintiff to employ the undersigned attorney to sue on the account. This claim has been presented to the Defendants more than thirty days prior to the filing of this action and remains unsatisfied. A reasonable attorney's fee would be $1,500.00. In event of any appeal from this court, further reasonable attorney's fees in connection with such appeal should be awarded to Plaintiff.

5. Exemplary Damages. Plaintiff respectfully requests that the Court award $3,000.00 as exemplary damages to discourage the kind of conduct engaged in by the Defendants in this cause.

6. Requests for Judgment. Plaintiff asks that citations issue and that Plaintiff have judgment against Defendants, jointly and severally, for the principal sum of the account, interest, attorney's fees, exemplary damages, costs of court, and for general relief.

LAW OFFICES OF DON L. BAKER
A PROFESSIONAL CORPORATION
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Austin, Texas 78701 476-6003

By: /s/
DON L. BAKER

Attorneys for Plaintiff

NO. 305,047

PATINOS, INC.	X	IN THE 250TH
	X	DISTRICT COURT
	X	
VS.	X	OF
	X	
KIRBY'S	X	TRAVIS COUNTY,
	X	TEXAS

JUDGMENT

On this day came on to be heard the above styled and numbered cause. It appearing to the Court that Defendants, Larry Poston and Robert Lee Allman, though duly cited to appear and answer herein, have wholly failed to appear and answer herein, that appearance day for the Defendants has passed, that Plaintiff is entitled to judgment by default, that the allegations of fact contained in Plaintiff's Original Petition should be taken as established, and the Court heard evidence and reviewed and considered the contents of the case file, and having found that the indebted-

ness sued upon and made the basis of this judgment was incurred by obtaining property by false representations and actual fraud other than a statement respecting financial condition, and also by fraud and defalcation while acting in a fiduciary capacity, done by Defendants jointly and severally:

It is ORDERED, ADJUDGED and DECREED that Plaintiff, Patinos, Inc., have and recover of and from Defendants, Larry Poston and Robert Lee Allman, jointly and severally, judgment in the total sum of $5,746.88, which includes Plaintiff's principal claim, interest to date, exemplary damages and attorney's fees, together with interest thereon from date of judgment at the rate of 9 percent (9%) per annum until paid, and for all costs of court in this behalf expended, for all of which let execution issue. In event of any appeal of

this judgment or attack upon the effect of this judgment, whether by direct appeal, Bill of Review, bankruptcy proceedings, or any other judicial proceedings, Plaintiff shall further have and recover as a part of this judgment reasonable attorney's fees for each of such proceedings separately in the amount of an additional $1,500.00 as against each party initiating same or necessitating legal services in connection therewith.

SIGNED July 11th, 1980.

/s/ Harley Clark
JUDGE PRESIDING

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: JAMES LARRY POSTON AND WIFE, PAMELA C. POSTON	X X X X	BANKRUPTCY NO. 1-80-00378-E
DEBTORS	X X	
PATINO'S, INC.	X X	
V.	X X	ADVERSARY NO. 1-81-0031
JAMES LARRY POSTON	X X	
IN RE: ROBERT LEE ALLMAN AND LISA P. ALLMAN	X X X X	BANKRUPTCY NO. 1-80-00379-E
DEBTORS	X X	
PATINO'S, INC.	X X X	ADVERSARY NO. 1-81-0030
V.	X X X X	(ADVERSARY PROCEEDINGS CONSOLIDATED UNDER NO. 1-81-0031)
ROBERT LEE ALLMAN	X	

MEMORANDUM OPINION AND ORDER

This case comes before the Court upon the Complaint of Patino's, Inc., Plaintiff,

to Determine the Dischargeability of Debts of Debtors, James Larry and Pamela C. Poston, and Robert Lee Allman and Lisa P. Allman. The Adversaries commenced by the Plaintiff creditor against the Debtors are consolidated under Adversary No. 1-81-0031-E.

The file and record of this consolidated proceeding indicates that on May 26, 1981, this Court entered Default Judgments in each of the Adversary proceedings prior to consolidation on October 29, 1981. The judgments by default were based on facts before the Court indicating summons and notice of Plaintiff's Complaints to Determine Dischargeability of Debts owed by the Debtors to Patino's, Inc. had been served upon the Debtors, but they had failed to answer. Prior to the entry of these judgments, the Plaintiff had sought Requests

for Admissions of Fact and Written Interrogatories from the Debtors; however, the Debtors failed to satisfy the requests. On June 8, 1981 and June 24, 1981, Motions for Rehearing were filed on behalf of the Debtors, Poston and Allman, respectively, by new counsel, Mr. Joseph Martinec. The Motions set forth sufficient good cause for this Court to grant the rehearing of each case on the basis of excusable neglect by the Debtor's substituted counsel, Mr. Wayne Langham, who it appears was suffering from acute emotional disorders during the initial pendency of the cases and who, in fact, had voluntarily committed himself to an Austin hospital for treatment of his disorders. The Debtors were granted additional time to serve upon the Plaintiff a motion or answer to the Complaints and to address the Plaintiff's requests for Admissions of

Fact and Written Interrogatories. The Debtors' (Poston and Allman) responsive pleadings, Answers to Interrogatories and Responses to Requests for Admissions were timely filed.

A hearing was held on the merits of the Plaintiff's Complaints on October 29, 1981 and on the basis of the testimony and evidence adduced at the hearing and the briefs submitted by counsel for the parties the Court is prepared to address the issues of fact and law presented.

The Plaintiff seeks nondischargeability under Section 523 of the Code for amounts owing to the Plaintiff, as supplier, from transactions made with the Debtors during their business as retailers. The portion of these consolidated proceedings involving Plaintiff, Patino's, Inc., and Debtors, James L. and Pamela C. Poston, and

Robert Lee Allman and Lisa P. Allman, concerns the entry of a State Court Default Judgment on July 11, 1980. On April 14, 1981, Plaintiff, Patino's Inc., filed suit in State Court seeking the recovery of an account balance of $3,149.25 for goods received by the Debtors on open account. The Plaintiff also sought attorney's fees in the amount of $1,500.00 and exemplary damages in the amount of $3,000.00. The key operative and relevant provisions of the Original Petition are included herein as Footnote 1.

The State Court's Judgment rendered as a result of the Defendant/Debtors' default is included in pertinent part in Footnote 2 herein.

As in Plaintiff Tober Saifer Shoe Co.'s case (Adversary No. 1-81-0024), Plaintiff, Patino's, Inc., also relies upon

certified copies of the Judgment and the underlying Original Petition as establishing the fact issues necessary to have the Debtors' debt declared non-dischargeable.

The Plaintiff asserts this Court is barred from hearing evidence on matters found in the Default Judgment entered by the State Court. The proposition is grounded upon theories of full faith and credit, res judicata and collateral estoppel. The argument that this Court is bound to the findings of the Judgment upon the basis of full faith and credit and res judicata is without merit and accordingly is removed from further consideration in light of the Supreme Court's ruling in Brown vs. Felsen, 442 U.S. 127 (1979), which this Court finds is controlling on both theories.

The Court finds, however, that the narrower concept of collateral estoppel may be asserted as a bar to subsequent bankruptcy proceedings concerning issues previously litigated in State Court proceedings. Id. at 139 N. 10. This Court is mindful of the Opinion by the Court of Appeals for the Fifth Circuit in In re Merrill, 594 F. 2d 1064, 1067 (5th Cir. 1979), holding that the party asserting the estoppel must show that the issue to be concluded is identical to an issue decided in the prior litigation, that it was actually litigated, and the decision on the issue must have been necessary to the prior judgment. Indeed, in Brown v. Felsen, Justice Blackman intimated that collateral estoppel may be applicable in the appropriate case to conclude issues once the bankruptcy court has determined the State liti-

gation actually and necessarily decided the same factual questions, and used the same standards which would be applied to determine dischargeability by the Bankruptcy Court. Id. at 139 N. 10. Nevertheless, by way of delineating the policy milieu in which these doctrines operate, or are found inoperable, the Court stated that Congress intended the Bankruptcy Court to have the "fullest possible inquiry" into allegations concerning the dischargeability of debts. Id. at 138. The Court noted that "absent trial on the merits, there is no particular reason to favor extraneous facts thrown into a record for §17 purposes over facts addressed before the bankruptcy court." Id. at 135. Such a stance should be particularly appropriate when examining what is ostensibly a State Court collection proceeding. See Id. at 134-35.

Following the rationale and standards of Brown vs. Felsen (supra) and In re Merrill (supra) this Court finds it is faced with a limited and insufficient State Court record in each of the cases upon which to determine whether the State Court actually and necessarily litigated the same issues and applied the same standards as must be applied by a Bankruptcy Court. Therefore, this Court is compelled to find it is not bound by collateral estoppel as to the Default Judgment.

In Spilman v. Harley, 656 F. 2d 224, 229 (6th Cir. 1981) the Court of Appeals for the Sixth Circuit required the Bankruptcy Court to determine if the issue was actually litigated and was necessary to the decision in the State court. In order to accomplish this examination, the Court stated it would require the Bankruptcy

Court to examine the "entire record of the state proceeding, not just the judgment". Id. at 228. The Court also noted that "[i]f the important issues were not actually litigated in the prior proceeding, as is the case with a default judgment, then collateral estoppel does not bar relitigation in the bankruptcy court." Id. at 228.

The Plaintiff's State Court Petition as set forth herein asserts there is a statement of account attached to it; however, no such statement of account is admitted into evidence in these proceedings. Indeed, the Plaintiff has submitted certified copies of the Plaintiff's Original Petition and Judgment, as the Clerk for the District Court of Travis County, Texas attests and certifies they appear on file and of record in his office. However, no statement of account is attached to the

certified copy of the Petition of Judgment and, consequently, this Court must assume there is none on file and of record in the State court. Furthermore, the Judgment recites that the Court heard evidence. However, the Plaintiff has not seen fit to present this Court with a Transcript upon which to make its required examination of an otherwise bare record. Pursuant to the authorities noted herein, this Court is obligated to look behind the Default Judgment and its bare recitals. However, since the Court is presented with a limited record, with no Transcript of the evidence heard having been offered or in evidence, and the apparent non-existence of the Statement of Account, the Court is unable to determine the precise factual issues litigated or the standards applied by the State Court to reach its conclusions of

law. Furthermore, the other evidence presented to the Court by the Plaintiff is insufficient to establish the non-dischargeability of the debt. Accordingly, from the foregoing this Court finds it is not bound by collateral estoppel to adopt the State Court's findings. The Plaintiff has failed to sustain its burden of proof and the debt is hereby found dischargeable. See Cook v. Harrington, 21 B.R. 112, 114 (D.N.M. 1982).

Therefore, it is hereby ORDERED that the debt sought to be declared non-dischargeable should be, and it is hereby, DISCHARGED in bankruptcy.

Accordingly, Plaintiff's request for the imposition of a constructive trust upon Defendants' real property is hereby DENIED.

Furthermore, Plaintiff's request for attorney's fees is also DENIED.

SIGNED AND ENTERED this 7th day of September, 1982.

/s/ Joseph C Elliott

JOSEPH C. ELLIOTT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE POSTON	X	
	X	
POSTINO'S, INC.	X	
Plaintiff-Appellant	X	
	X	CIVIL ACTION NO.
V.	X	A-82-CA-562
	X	
JAMES LARRY	X	
POSTON, and	X	
ROBERT LEE ALLMAN,	X	
Defendants-Appellees	X	

MEMORANDUM OPINION

This case is before the Court on appeal from bankruptcy court. Having reviewed the record on appeal, the briefs of the parties, and the pleadings on file, the Court finds that the facts and legal arguments are adequately presented in the briefs and record and that its decision would not be significantly aided by oral argument. See Bank. R. 8012. The Court affirms the decision of the court below.

The plaintiff, Patino's, Inc., seeks nondischargeability under section 523 of the Bankruptcy Code for amounts owing to it from transactions made with the defendants, James Poston and Robert Allman, during their business as retailers. Patino's asserts that the bankruptcy court was barred from hearing evidence on matters found in a default judgment previously entered by a state court in favor of Patino's claim against the defendants. Patino's further asserts that the bankruptcy court erred in failing to impose a constructive trust on the defendants' property.

Patino's's argument rests on the theories of full faith and credit, res judicata, and collateral estoppel. The proposition that a bankruptcy court is bound to the findings of a state court judgment because of res judicata and the full faith

and credit clause has been rejected by the Supreme Court. Brown v. Felsen, 442 U.S. 127 (1979). The Court expressly held that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry in the true nature of the debt. Id. at 138. Accordingly, Patino's argument is invalid insofar as it invokes the full faith and credit clause and the doctrines of res judicata.

Patino's is correct in asserting that collateral estoppel may bar a party in bankruptcy court from relitigating an issue that has already been decided in a prior adjudication in state court. Merrill v. Walter E. Heller & Co. (In re Merrill), 594 F.2d 1064 (5th Cir. 1979). Federal rules of collateral estoppel apply in bankruptcy proceedings. Id. at 1066 n.1. Under fed-

eral rules, if an issue was not actually litigated in the prior proceeding, as is the case with a default judgment, then collateral estoppel does not bar relitigation in the bankruptcy court. Spilman v. Harley, 656 F.2d 224 (6th Cir. 1981). The default judgment issued against the defendants in this case therefore did not preclude relitigation of any issues in bankruptcy court.

Patino's asserts also that the bankrutpcy court erred in not imposing a constructive trust in its favor on the defendants' real property. While state law determines whether property is subject to a constructive trust, "the issue of whether the property [is] indeed so impressed [is] properly determined as a federal bankruptcy issue by the bankruptcy court . . . ." Texas v. Wellington Resources Corp., 706 F.2d 533 (5th Cir. 1983).

According to Patino's, the elements necessary to impose a constructive trust have been established either by the state court judgment or by admissions in the proceedings before the bankruptcy court. As noted above, the default judgment in state court did not bar the bankruptcy court from reconsidering the question of a constructive trust. Furthermore, the bankruptcy court properly granted the defendants' motion for a rehearing, after which they negated the effect of their earlier failure to respond to Patino's's request for admissions. See Bank. R. 7055, 9024; Fed. R. Civ. P. 60(b). The bankruptcy court found that Patino's failed to present sufficient evidence to sustain its burden of proof. Since the bankruptcy court's denial of a constructive trust was not clearly erroneous, this Court may not disturb it. Bank. R. 8013.

The decision of the bankruptcy court is **AFFIRMED.**

ENTERED this 7 day of February 1984, in Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE MATTER OF JAMES LARRY POSTON,
Bankrupt

PATINO'S, INC., Plaintiff-Appellant,

V.

JAMES LARRY PSOTON, ET AL.,
Defendants-Appellees,

No. 84-1230
Summary Calendar.

United States Court of Appeals,
Fifth Circuit

July 9, 1984

Before TATE, HIGGINBOTHAM and DAVIS, Circuit Judges.

TATE, Circuit Judge:

This case arises under the Bankruptcy Code of 1978, 11 U.S.C. § 101 et seq. The creditor, Patino's, Inc. ("Patino's"), brought a complaint in the bankruptcy court seeking to have a debt owed to it by the debtors, James Poston and Robert Allman, declared nondischargeable under the exceptions to dischargeability set forth in

Section 523 of the Bankruptcy Code, 11 U.S.C. § 523. The bankruptcy court found the debt to be dischargeable, and the district court affirmed. Patino's appeals, primarily contending that the bankruptcy court erred in refusing to give collateral estoppel effect to a prebankuptcy state court default judgment against the debtors in favor of Patino's. Finding no merit to the creditor's contentions, we affirm.[1]

---

[1]This case is decided in conjunction with a companion bankruptcy case, Matter of Allman, (slip op. 4479, 1984), _____ F.2d _____ (5th Cir. 1984), which also names Allman and Poston as defendant debtors. The creditor in Allman raises three issues identical to those raised by Patino's here, (1) that the bankruptcy court failed to give full faith and credit to the state court judgment, (2) that the requests for admissions filed by it in the bankruptcy court should have been sufficient to establish this claim that the debts owed were nondischargeable, and (3) that the bankruptcy court erred in not placing a constructive trust on the debtors' property. For the reasons stated in the

The creditor Patino's filed a complaint in the bankruptcy court to determine the dischargeability of amounts owed to it by Poston and Allman. Patino's alleged that the defendants, who had been engaged in the retail shoe business, incurred the debts at issue by obtaining property by "false representations and actual fraud" and by "defalcation while in a fidicuary capacity." Based on these allegations, Patino's sought to have the debt owed to it by these defendants declared nondischargeable under the provisions of § 523(a)(2) & (4) of the Bankruptcy Code, 11 U.S.C. § 523 (a)(2) & (4).

In support of this claim, Patino's relied upon Texas state court proceedings that had, prior to the debtors' bankruptcy

Allman decision, we find no merit to these contentions.

petition, resulted in a default judgment in its favor against the debtors. In the bankruptcy court, Patino's introduced certified copies of its state court pleadings and the default judgment issued by that court against the defendants. It also relies on requests for admissions filed by it in the bankruptcy proceedings.

After reviewing the record, the bankruptcy court held it would not accord collateral estoppel effect to the state court judgment in the absence of a sufficient factual basis in the state record to support the conclusions recited in the state court judgment, and that Patino's had not otherwise introduced sufficient evidence to support its contention that the debts were nondischargeable under the Bankruptcy Code, 11 U.S.C. §523.

Patino's now appeals these determinations, which were affirmed by the district court.

I.

Patino's claims that the bankruptcy court erred in failing to give collateral estoppel effect to the Texas state court defautl judgment against the defendant debtors, because that judgment recited "that the indebtedness sued upon and made the basis of this judgment was incurred by obtaining property by false representations and acutal fraud other than a statement respecting financial condition, and also by fraud and defalcation while acting in a fiduciary capacity." After reviewing the record of the state court proceedings as introduced by Patino's, however, the bankruptcy court concluded that these recitals

as to fraud and false pretenses were not supported by factual findings in the record. The bankruptcy court also stated:

> The plaintiff's state court petition as set forth herein asserts there is a statement of account attached to it; however, no such statement of account is admitted into evidence in these proceedings. Indeed, the Plaintiff has submitted certified copies of the Plaintiff's Original Petition and Judgment, as the clerk for the district court of Travis County, Texas attests and certifies they appear on file and of record in his office. However, no statement of account is attached to the certified copy of the Petition of Judgment and, consequently, this court must assume there is none on file and of record in the

> state court. Furthermore, the [state court] judgment recites that the court heard evidence. However, the plaintiff has not seen fit to present this court with a transcript upon which to make its required examination of an otherwise bare record . . .[W]ith no Transcript of the evidence heard [in the state court proceeding] having been offered or in evidence, and the apparent non-existence of the statement of account, [this] court is unable to determine the precise factual issues litigated or the standards applied by the state court to reach its conclusions of law.

Applying the principles of collateral estoppel in bankruptcy dischargeability proceedings as enunciated by this court in Matter of Shuler, 722 F.2d 1253 (5th Cir.

1984), we find no error in the bankruptcy court's collateral estoppel determination.

The state court default judgment reviewed by the bankruptcy court states in its entirety:

> On this day came on to be heard the above styled and numbered cause. It appearing to the Court that Defendants, Larry Poston and Robert Lee Allman, though duly cited to appear and answer herein, have wholly failed to appear and answer herein, that appearance day for the Defendants has passed, that Plaintiff is entitled to judgment by default, that the allegations of fact contained in Plaintiff's Original Petition should be taken as established, and the Court heard evidence and reviewed and considered the

contents of the case file, and having found that the indebtedness sued upon and made the basis of this judgment was incurred by obtaining property by false representations and actual fraud other than a statement respecting financial condition, and also by fraud and defalcation while acting in a fiduciary capacity, done by Defendants jointly and severally:

It is ORDERED, ADJUDGED and DECREED that Plaintiff, Patinos, Inc., have and recover of and from Defendants, Larry Poston and Robert Lee Allman, jointly and severally, judgment in the total sum of $5,746.88, which includes Plaintiff's principal claim, interest to date, exemplary damages and attorney's fees, together with interest thereon from date of

judgment at the rate of 9 percent (9%) per annum until paid, and for all costs of court in this behalf expended for all of which let execution issue. In event of any appeal of this judgment or attack upon the effect of this judgment, whether by direct appeal, Bill of Review, bankruptcy proceedings, or any other judicial proceedings, Plaintiff shall further have and recover as a part of this judgment reasonable attorney's fees for each of such proceedings separately in the amount of an additional $1,500.00 as against each party initiating same or necessitating legal services in connection therewith.

Since this state court default judgment recites that the state court has "heard evidence and reviewed and considered the

contents of the case file" and states that the debt was incurred through false representations and actual fraud, Patino's contents that the bankruptcy court should have given conclusive collateral estoppel effect to the state court's findings of fraud and false pretenses for Section 523 bankruptcy dischargeability purposes. See 11 U.S.C. § 523(a)(2), (4).

We have held "that collateral estoppel may apply to subsidiary facts actually litigated and necessarily decided" in a prior judicial proceeding, Matter of Shuler, 722 F.2d 1253, 1256 (5th Cir. 1984). Nonetheless, collateral estoppel does not "bar a bankruptcy court from receiving evidence as to facts by which that court may determine the character, and ultimately, the dischargeability of the debt." Id. at 1255; see also Brown v. Felsen, 442 U.S.

127, 138-139, 99 S.Ct. 2205, 2213, 60 L. Ed.2d 767 (1979) (finding that "the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceeding when considering the dischargeability of [a] debt"), and Carey Lumber Co. v. Bell, 615 F.2d 370, 377 (5th Cir. 1980). The recitals and conclusions contained in the state court default judgment, therefore, must be supported by "detailed facts sufficient as findings to meet the federal test of nondischargeability" and allow the bankruptcy court "to discern from the record the subsidiary facts upon which the false pretense allegation was made." Shuler, supra, 722 F.2d at 1257-58.

A review of the state court record placed in evidence before the bankruptcy court reveals that the bankruptcy court did not err in finding that the record contain-

ed insufficient detailed facts to support the conclusory recitals in this state court judgment. Other than the broad allegations in Patino's state court pleadings,[2] the record contained no evidence of the false-

---

[2]Patino's state court pleadings allege:

> Liability for Debt. Although proper demands for payment have been made, Defendants have failed to pay the account balance, due in the amount of $3,149.25. By reason of their failure to comply with various legal requirements pertaining to corporations, the individual Defendants have become individually liable on this debt. The business of the Defendants was also conducted as a partnership at the time of incurrence of this debt and each individual Defendant is liable as a partner. The indebtedness herein sued upon is also for defalcation while acting in a fiduciary capacity. Defendants also represented that they were solvent and able to pay for the goods as the debt came due when they purchased the same on open account. In fact, Defendants and each of them were insolvent at the time of ordering and at the time of receiving the goods, and had no real purpose, intention or hope of making payment on the account.

pretense or fraudulent conduct upon which the state court judgment default was allegedly in part based.

The circumstances of the present case thus parallel those faced by this court in Shuler, supra, 772 F.2d at 1257-58, where we stated:

> Unlike the consent judgment in Carey Lumber Co. v. Bell, supra, see 615 F.2d at 378, the judgment in the present case did not contain detailed facts sufficient as findings to meet the federal test of nondischargeability; it contained merely a conclusory statement that the plaintiff was entitled to judgment on a false-pretense cause of action. Nor, on examining the pleadings . . . with the judgment, the entire record of the state pro-

ceedings, are any facts discernible that show the specific false-pretense conduct, by which the federal bankruptcy court might determine the creditor's claim of nondischargeability, measured by federal bankruptcy standards. If only for these reasons, the bankruptcy court--unable to discern from the record the subsidiary facts upon which the false-pretense allegation was made--property refused to accord collateral estoppel effect to the conclusory false-pretense "determination" in the state court judgment.

Without subsidiary facts in the state court record from which the bankruptcy court could discern the specific basis for the false-pretense conduct determination recited by the state court in its judgment,

the bankruptcy court properly refused collateral estoppel effect to the state court default judgment and was "not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of [the] debt." Brown v. Felsen supra, 442 U.S. at 138-39, 99 S.Ct. at 2213. Thus, upon a review of the entire record before the bankruptcy court, we find no clear error in the bankruptcy court's determination that the creditor Patino failed to meet its ultimate evidentiary burden of showing the nondischargeability of the debts at issue.[3]

---

[3]As was the case in Shuler, we leave for another day the question of whether a default judgment meets the actually litigated test for collateral estoppel.

> Having determined as a threshold matter that the state proceedings here cannot factually be accorded collateral estoppel effect, the bank-

II.

In that we find no merit to the creditor Patino's's contentions on appeal, we AFFIRM the judgment of the district court affirming the judgment of the bankruptcy court, which rejected the creditor's claim that the debt was nondischargeable.

AFFIRMED.

> ruptcy court did not reach, nor do we, the further issue of whether a default judgment meets the "actually litigated" test for collateral estoppel for bankruptcy dischargeability determinations. According to Spilman v. Harley, [656 F.2d 224 (6th Cir. 1981)], the preponderant view (citing decisions) is that a default judgment does not through collateral estoppel bar relitigation in the bankruptcy court, 656 F.2d at 228; see, to the same effect, Franks v. Thomason [4 B.R. 814, 821 (Bkrtcy.N.D.Ga. 1980)].

Shuler, supra, 722 F.2d at 1257 n. 6.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MASONRY PRODUCTS, INC., Plaintiff-Appellant	X	
	X	
VS.	X	CIVIL NO.
	X	A-83-CA-635
RICHARD BENAVIDES, Defendant-Appellee	X	

ORDER

On this 5th day of January, 1984, came on for consideration the appeal from bankruptcy court in the above-styled and numbered cause. The Court having reviewed the record on appeal, the briefs of the parties, and the pleadings on file in the appellate record enters the following order. The Court having reviewed the state court judgment against Appellee has determined that the summary judgment proceedings entered in the state court are

sufficient to support a finding that there was evidence of defalcation in a fiduciary capacity. This Court is bound by the principle of collateral estoppel as to the fact issues determined by the state court judge. See Brown v. Felsen, 442 U.S. 127 (1979); International Association of Machinists vs. Nix, 512 F.2d 125 (5 C.A. 1975) and Spillman v. Harley, 656 F.2d 224 (6 C.A. 1981). This Court must therefore give full faith and credit to the state court judgment and holds that the findings and the summary judgment proceedings are sufficient to support the allegations in the pleadings on file. See Goodyear Tire and Rubber Co. v. Jefferson, 565 S.W.2d 916 (Tex. Sup.Ct. 1978). This Court hereby finds that the debt claimed by the Creditor is non-dischargeable and remands this cause to the Bankruptcy Court to enter a judgment

holding accordingly. It is further ORDERED that the Bankruptcy Court hear evidence on attorney's fees and the question of imposition of a trust upon the property of the Debtor herein.

IT IS SO ORDERED this 5th day of January, 1984.

/s/

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

(2)

Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-368

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF JAMES LARRY POSTON,

PATINO'S INC,
Petitioner

VS.

JAMES LARRY POSTON AND
ROBERT LEE ALLMAN,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Robert Allman and James Poston operated a shoe store in Austin, Texas. One of many suppliers to the Shoe Store was Patino's Inc. Patino's sued Poston and Allman in state court using the shotgun offense made possible by word processors. As it is typical of many small businessmen who find themselves on the ropes, they failed to defend the suit and a defualt judgment was entered. The judgment contained stock verbage from 11 USC Section 523.

Subsequently, both Poston and Allman sought relief under Chapter 7 of the Bankruptcy Code wherein Patino's raised the issue of nondischargeability.

Patino's filed a complaint in the bankruptcy proceeding objecting to the discharge of its debt on the basis that it was one "for obtaining money, property, or services by false pretenses other than a statement respecting

financial condition." Upon trial of the complaint before the bankruptcy judge, Patino's relied solely on the "false pretense" recitations of its state court default judgment; it offered no evidence to support the false pretense allegations in its complaint, and it offered no evidence that any evidence of that nature was considered by the state court judge. Indeed it did not because it could not. There was simply no fraud in the case which could be proved in any forum. But if it could raise its illegitimate and completely unfounded pleading to a judgment entitled to the sanctuary of res judicata, then it would have created the collection lawyer's paradigm--a grain of truth would have been converted into a nondischargeable unassailable pound of flesh.

SUMMARY OF ARGUMENT

The U.S. Bankruptcy Court has exclusive jurisdiction to determine the dischargeability

of a debt in a bankruptcy proceeding. No state court has jurisdiction to determine the issue of dischargeability, and hence 28 USC 1738 does not extend full faith and credit to any state court judgment to the extent such judgment purports to decide the issue of dischargeability. Being exclusively a creature of federal law, federal preclusion and collateral estoppel rules govern the effect of a state court judgment when it is sought to be utilized by any party before the bankruptcy court on the issue of dischargeability.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AS TO THE PROPER APPLICATION OF 28 U.S.C. 1738.

The Petitioner cites Allen V. McCurry, 449 U.S. 90, 96 (1980) for the proposition that the federal courts should apply state law in determining the collateral estoppel effect of prior state court adjudication. In the Allen

case, the state criminal trial court refused, under Fourth and Fourteenth Amendment challenges, to supress certain evidence seized in a narcotics raid. In a subsequent civil suit against the arresting officers under 42 U.S.C.S. 1983, this court sustained the District Court's use of collateral estoppel to prevent the defendant from relitigating the search-and-seizure question adversely decided against him in the state court.

The difference in the Allen case and the instance case is readily apparent. No citations are necessary for the proposition that both the state and federal courts have jurisdiction to decide Fourth Amendment issues. In this case, however, only the federal courts, have jurisdiction to decide the issue of dischargeability of a debt in bankruptcy. The bankruptcy court has exclusive jurisdiction to decide dischargeability questions, and no state

court judgment may stand as a res judicata bar on that issue. Brown v. Felsen, 422 U.S. 127 (1979). Since the dischargeability issue cannot be adjudicated in state court, it is patently ridiculous to apply state law in determining the collateral estoppel effect of that which cannot be adjudicated in the state forum. This Court has already rejected Petitioner's reasoning in Simpson V. Shuler, 722 F2d 1253 (5th Circ. 1984) by denying the petition for writ of certiorari on October 1, 1984.

2. TEXAS LAW DOES NOT COMPEL ISSUE PRECLUSION.

Petitioners extensive recitation of state law regarding pleadings is illustrative of the point so clearly missed or avoided in Petitioner's case. This Court has essentially determined that questions of collateral estoppel must have a contextually appropriate answer. In Brown V. Felsen, supra, and in all cases

emanating therefrom, it is clearly the law of the land that 1) state courts do not have authority to try issues of dischargeability, and 2) bankruptcy courts are entitled to consider the circumstances of judgments taken while debtors are in dire straits.

The only case cited by Petitoner which related to a bankruptcy case was Wilhite V. Adams, 640 SW 2d 875 (Tx Sup 1982). Whilhite is poor authority for Patino's's position because the state court honored the fully and actually litigated findings of the bankruptcy court. In any circumstance in which the "actually litigated" test is set forth, Petitioner's argument crumbles.

3. THE DECISION BELOW DOES NOT RAISE SIGNIFICANT AND RECURRING PROBLEMS OF COLLATERAL ESTOPPEL UNDER 28 U.S.C. 1738 IN BANKRUPTCY DISCHARGEABLILITY QUESTIONS.

The only recurring and significant problem which the Fifth Circuit's decision raises is

that it prevents collection lawyers from taking one the easy way. It forces them to actually prove up their dischargeability case in the bankruptcy court.

The Fifth Circuit's application of collateral estoppel fully insures that issues honestly litigated and determined in prior state court proceedings may be considered by the bankruptcy court in determining dischargeability issues. In appropriate instances the state court judgment may be conclusive. Carey Lumber Co. v. Bell, 615 F. 2d 370 (5th Cir. 1980). The application of federal preclusion and collateral estoppel rules requires that the dischargeability issue be fairly addressed, and the application of these rules is consistent with the concept of exclusive federal jurisdiction.

Recognizing this, the Petitioner urges this Court to abandon it adopted in Brown V. Felsen,

supra. We are told that the reasons for exclusive federal jurisdiction are not present today. We are further assured that there is "no danger of abuse in a pre-bankruptcy suit," when it is obvious what kind of abuse Petitioner seeks to achieve with its pre-bankruptcy suit. Absent the exclusive jurisdiction restraint, unwitting state court judges could determine the dischargeability issue by entering default judgments which parrot completely unfounded fraud pleadings in a petition.

The Fifth Circuit's decision governing the role of a state court default judgment in the determination of the dischargeability of a debt in a bankruptcy proceeding adequately and fairly protects the debtor from the unfounded fraud claim, and insures that the defrauded creditor have his day in court. The party which presently exists is derived from the exclusive federal jurisdiction in dischargeability

questions, and any departure from the exclusive jurisdiction rule would only serve the unscrupulous.

CONCLUSION

For these reasons, a writ of certiorari should not issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16 day of November, 1984, three copies of this Brief in Opposition was mailed via First Class U.S. Mail to Don L. Baker, BAKER & PRICE, 314 W. 11th Street, Suite 500, Austin, Texas 78701, Attorney for Petitioner, and further certify that all parties required to be served have been served.

ORIGINAL SIGNED BY
John C. D. Drolla, Jr.

John C.D. Drolla, Jr.